No. 91-2019

In the
Supreme Court of the United States
October Term, 1991

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY E. DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the rule of Terry v. Ohio, 392 U.S. 1 (1968) permit a police officer to perform a "pat frisk" for evidence, and then, upon discovering an item in a detainee's interior pocket which is clearly not a weapon, to manipulate the item, remove it and inspect it?

PARTIES

The State of Minnesota was represented in the Hennepin County District Court by Ms. Gail Baez, Assistant Hennepin County Attorney, and in the Minnesota appellate courts by Ms. Beverly Wolfe, Assistant Hennepin County Attorney.

The Minnesota Attorney General, Mr. Hubert H. Humphrey III, did not appear in this case, and did not file a brief.

Mr. Timothy E. Dickerson, Respondent in this Court and in the Minnesota Supreme Court, was represented in the Hennepin County District Court by Mr. Scott A. Holdahl and Ms. Mary F. Moriarty, Assistant Hennepin County Public Defenders. Mr. Dickerson was represented in the Minnesota appellate

courts, and is represented in this Court, by Peter W. Gorman, Assistant Hennepin County Public Defender.

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STATEMENT OF THE CASE

Respondent Timothy E. Dickerson accepts the statements of the case and facts which appear in the opinions of the Minnesota appellate courts and in the State's Petition For A Writ Of Certiorari except in these respects:

1) The State failed to note in its Petition that the police officer who performed the "pat-frisk" testified that one of his purposes in doing so was to uncover evidence (T.9).[1]

2) The State failed to note in its Petition that, when the police approached Respondent Dickerson, they did not observe any suspicious bulges in his clothes, and that Dickerson stopped instantly when told to do so, complied

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1. T refers to the transcript of the evidentiary hearing, February 20, 1990.

with the officers' directions, and made no furtive or other threatening gestures (T.17-20).

3) The Minnesota Supreme Court's observation that the size of the piece of cocaine at issue in this case was "the size of a pea or a marble[,]", 481 N.W.2d 840, 843 (Minn. 1992), appears nowhere in the testimonial record. The State did not introduce the cocaine into evidence, nor did the police officer who testified describe its size. The record does not appear to indicate that the cocaine itself was ever in the courtroom, nor observed by any of the lawyers. One of the lawyers in her oral summation described the cocaine as something which might be the size of a pea or a marble (T.47), but the record does not indicate that she or any other

party to the case saw it. All that any party to this case knows, and all that the record reflects, about the cocaine was that it weighed 0.2 gram. The Court may take judicial notice that this is less than an ordinary household 200-milligram aspirin tablet weighs. Fed. R. Evid. 201(b).

SUMMARY OF THE ARGUMENT

1) The State of Minnesota's Petition For A Writ Of Certiorari To The Minnesota Supreme Court should be denied because the case is moot. On May 6, 1992, the Hennepin County District Court, pursuant to Minnesota law, vacated its prior adjudicatory order and deferred sentencing, and dismissed this criminal proceeding. Therefore, no "case or controversy" within the meaning of Article III, § 2 of the United States Constitution exists.

2) The State of Minnesota's Petition For A Writ Of Certiorari To The Minnesota Supreme Court should be denied because the Minnesota appellate courts properly applied the rule of Terry v. Ohio, 392 U.S. 1 (1968).

3) The State of Minnesota's Petition For A Writ Of Certiorari To The Minnesota Supreme Court should be denied because the conflict claimed by the State of Minnesota in the lower courts regarding the use of the so-called "plain touch" exception to the warrant requirement of the Fourth Amendment to the United States Constitution is neither as pronounced nor involves as many cases as the State of Minnesota claims. The cases cited by the State of Minnesota actually involve a number of different theories of arrest and search, not simply the so-called "plain touch" exception.

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On Petition For A Writ Of Certiorari

To The Minnesota Supreme Court

Respondent's Brief In Opposition

THE STATE'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

I. THIS CASE IS MOOT AND PRESENTS NO "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III, § 2 OF THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

Respondent Timothy E. Dickerson was charged in the Hennepin County District Court on December 19, 1989 with the offense of fifth degree controlled substance possession, Minn. Stats. § 152.025, subd. 2(1), § 152.025, subd. 3(a). He moved to suppress the evidence on a number of grounds, one of which was that the police conducted an unlawfully intrusive "pat frisk" of his person which violated the rule of Terry v. Ohio, 392 U.S. 1 (1968).

The Hennepin County District Court heard testimony on Respondent's motion to suppress on February 20, 1990, and issued its ruling denying the motion to suppress on March 6, 1990.

Thereafter, Respondent Dickerson and the State of Minnesota submitted a fact stipulation with waiver of jury trial to the trial court, a procedure permitted under Minnesota law which preserves the right to appeal. *See* State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980). The trial court accepted the fact stipulation, and found that Respondent had committed the offense charged.

On May 9, 1990, the District Court deferred further proceedings under Minn. Stat. § 152.18, a statute commonly used in cases of offenders charged with minor drug offenses.

Under Minn. Stat. § 152.18, a person who either pleads guilty or is found guilty is not formally adjudicated guilty. The trial court prescribes conditions with which the person must comply over a specified period. Following successful compliance with those conditions, the trial court vacates the guilty plea or the finding of guilt, and dismisses the criminal complaint and proceeding.

The statute provides, "Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose." Minn. Stat. § 152.18, subd. 1. This statute is reproduced at Appendix D-2,3 of the State's Petition For A Writ Of Certiorari. The person is

then entitled to have all records concerning the case expunged from the official records of the court and the police agencies involved, Minn. Stats. § 152.18, subd. 2, § 299C.11, aside from a non-public record kept by the Minnesota Department of Public Safety. *See generally* State v. C.A., 304 N.W.2d 353 (Minn. 1981). These statutes are reproduced here at Appendix B. Such an order "restore[s] the person, in the contemplation of the law, to the status the person occupied before such arrest . . . ." Minn. Stat. § 152.18, subd. 2. The expungement provision of the statute is not self-enforcing: it requires a motion by the defendant.

Respondent Dickerson complied with the conditions of his deferred sentence. On April 28, 1992, just prior to the

scheduled expiration of the supervision period, the Hennepin County probation department's officer prepared the standard order the department uses in cases deferred under Minn. Stat. § 152.18, and presented it to the District Court for signature. The court signed it. The order, which was filed on May 6, 1992, and appears here as Appendix A, vacated the finding of guilt and dismissed the criminal complaint and proceeding.

Respondent Dickerson has not yet sought the formal expungement to which he is entitled by Minn. Stat. § 152.18.

B. The Rule Of Mootness

Article III, § 2 of the United States Constitution limits this Court's

subject-matter jurisdiction to adjudication of "cases or controversies."

One of the rules this Court has adopted in applying Article III is "mootness." Mootness analysis "looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case' or 'controversy' which meets the article III test of justiciability . . . ." Laurence H. Tribe, American Constitutional Law § 3-11, at 82 (2d Ed. 1988). "A case is moot, and hence not justiciable, if the passage of time has caused it completely to lose 'its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law.'" *Id.* at 83.

The rule that courts should not decide cases which have become moot "derives from the common law notion that the function of the judiciary is limited to determining rights and obligations that are actually controverted in the particular case before the court." Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Supreme Court Practice 711 (6th Ed. 1986).

In a number of criminal cases, this Court has examined the circumstances under which the completion of a criminal prosecution or sentence will render an appeal from that case moot. Every one of this Court's mootness cases involves a criminal conviction or sentence. In the present case, by contrast, there has been no conviction or sentence. In all but one of this Court's mootness cases, the

Appellant or Petitioner before this Court was the criminal defendant in the lower court. *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968); *but, see* Pennsylvania v. Mimms, 434 U.S. 106 (1977).

One line of this Court's cases holds that completion of a sentence or release from parole, *after conviction*, will render an appeal by the criminal defendant moot. *See* St. Pierre v. United States, 319 U.S. 41 (1943); Jacobs v. New York, 388 U.S. 431 (1967); Tannenbaum v. New York, 388 U.S. 439 (1967); Weinstein v. Bradford, 423 U.S. 147 (1975).

However, a parallel line of cases explicitly holds that a criminal appeal will not be moot if there remains the possibility of some adverse collateral consequence *to the criminal defendant*. *See* Fiswick v. United States, 329 U.S.

211, 220-22 (1946) (alien deportation, loss of civil rights); United States v. Morgan, 346 U.S. 502, 512-13 (1954) (future penalty enhancement, loss of civil rights); Pollard v. United States, 352 U.S. 354, 358 (1957) (unspecified collateral consequences); Ginsberg v. New York, 390 U.S. 629, 633 n. 2 (1968) (municipal regulatory licensing); Sibron v. New York, 390 U.S. 40, 50-58 (1968) (character impeachment at future trial, future penalty enhancement); Evitts v. Lucey, 469 U.S. 387, 391 n. 4 (1985) (same).

Similarly, this Court has also held that a criminal appeal is not moot if reversal of a conviction by the courts ~~below prevents~~ *the state* from imposing adverse consequences in a future criminal proceeding. Pennsylvania v. Mimms, 434

U.S. 106, 108 n. 3 (1977) (bail setting, length of sentence, availability of probation).

C. Mootness When There Is No Conviction Below

Very few federal cases have discussed mootness in the context of an appeal in a criminal case which was dismissed below. Wright and Miller say that "[i]t is difficult to imagine any role for collateral consequences doctrine [to defeat a mootness objection to a government appeal following a dismissal without conviction.]". 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.4, at 307 (2d Ed. 1984).

In United States v. Sarmiento-Rozo, 592 F.2d 1318 (5th Cir. 1979) the court

held that dismissal of the criminal case by the trial court for lack of jurisdiction, followed by deportation of the defendants, mooted the government's appeal.

This Court noted United States v. Sarmiento-Rozo, but declined to follow it in a case resting upon a substantially different procedural history. In that case, United States v. Villamonte-Marquez, 462 U.S. 579 (1983), the defendants had been convicted. The convictions were then reversed on appeal, and the defendants were deported. The mootness issue arose in that context, which is substantially different from the facts in United States v. Sarmiento-Rozo, where there was not only no conviction, but also where the charge had been dismissed in the trial court.

D. This Petition Is Moot

In light of the rules established by these cases, this Petition For A Writ Of Certiorari should certainly be denied as moot.

Respondent Dickerson has never been convicted of the crime charged in this case. He has not been jailed, fined, nor subjected to any penal consequence. His case has been dismissed without any adjudication. *See* Appendix A. His character can never be impeached by reference to this proceeding, he cannot suffer any regulatory licensing handicap, *see* Bourbon Bar and Cafe v. City of St. Paul, 466 N.W.2d 438 (Minn. Ct. App. 1991), he cannot be deported, and no future criminal penalty can be enhanced by reference to this proceeding.

Under Minn. Stats. § 152.18 and § 299C.11, Mr. Dickerson has an absolute right to have all information related to this case expunged from the records of the District Court and the police agencies involved, aside from the single non-public record which the Minnesota Department of Public Safety is permitted to keep. Once he obtains this mandatory expungement relief, his status is the same as it was before his arrest. Minn. Stat. § 152.18, subd. 2.

It is thus patently clear that Respondent Dickerson has neither suffered, nor will he suffer from, any adverse collateral consequence of this criminal proceeding. In short, this criminal proceeding will have absolutely no effect on his future life.

Moreover, it is just as clear that the State of Minnesota has not suffered, and will not suffer, from its inability to impose in the future any adverse collateral consequence relating to this case. *See* Pennsylvania v. Mimms, 434 U.S. 106, 108 n. 3 (1977).

The Minnesota Supreme Court's ruling in this case had nothing to do with the issuance of the "vacate and dismiss" order filed under Minn. Stat. § 152.18 in this case. *See* Appendix A. After the Minnesota Court of Appeals issued its ruling in April, 1991, Respondent Dickerson's counsel instructed him to continue to comply with the District Court's deferred sentence. He did so. When the District Court signed its order of April 28, 1992 which vacated the finding of guilt and dismissed the

criminal case, it did so, not because of the Minnesota Supreme Court's ruling, but because the specified time period had run and Respondent Dickerson had complied with its orders. *See* Appendix A.

What deprives the State of any future adverse collateral use of this criminal proceeding is Mr. Dickerson's satisfactory completion of the conditions of the deferred sentence, and the dismissal of the case to which Dickerson was entitled under state law, not the Minnesota Supreme Court's ruling on the evidentiary issue.

The State of Minnesota may claim that it should have the right to make adverse use of this criminal proceeding in the future, and that the Minnesota Supreme Court's ruling below deprives it of that right. However, the only

conceivable adverse use would be ensuring that Respondent would not again obtain a second deferred sentence, should he again be charged with this type of drug offense.

However, such a claim is quite hypothetical because it assumes that Respondent Dickerson, a first offender at the time this case arose, would again be charged with a similar offense. Besides its speculative nature, such a claim ignores three facts.

First, it ignores this Court's holding that the mere future possibility that a convict might again be in prison (or convicted of a crime) does not defeat a mootness claim on appeal, Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

Second, it ignores the fact that it is not the Minnesota Supreme Court's ruling in this case that deprives the State of adverse collateral use of this proceeding. Rather, it is the operation of the statute under which Mr. Dickerson's sentence was deferred, Minn. Stat. § 152.18, that does so.

Third, it ignores the fact that there is nothing in Minn. Stat. § 152.18 which prohibits its use with the same offender a second time. Even if Respondent Dickerson should be charged with a similar offense a second time, and even if this Court were to reverse the Minnesota Supreme Court on the evidentiary issue, the existence of the non-public record of this proceeding would not necessarily prevent a similar deferred sentence from being imposed in

the future. Because the existence of a first deferred sentence under Minn. Stat. § 152.18 does not prevent a person from receiving a second deferred sentence under that statute, the State of Minnesota is not deprived by the Minnesota Supreme Court's ruling in this case of any adverse collateral use of this criminal proceeding. The Petition is, for that additional reason, moot.

For all of these reasons, this Court should deny the Petition For A Writ Of Certiorari on the ground that the case is moot.

II. THE MINNESOTA COURTS PROPERLY APPLIED THE RULE OF TERRY v. OHIO, 392 U.S. 1 (1968).

A. Introduction

Respondent Dickerson strenuously objects to the manner in which the State of Minnesota has characterized the issue in this case.

The State would have this Court believe that its officer, while performing a "pat frisk" that the Minnesota courts held proper, actually saw cocaine but that the State was nevertheless precluded from prosecuting Respondent for possession of that cocaine. Petition For A Writ Of Certiorari at 10-11, *citing*, Michigan v. Long, 463 U.S. 1032 (1983).

This argument, which the State of Minnesota also made unsuccessfully in

this case before the Minnesota Supreme Court, State's Petition For Further Review at 5-6, misstates both the issue and holdings by the Minnesota courts.

Moreover, the State appears to imply, incorrectly, in its "Question Presented" that the officer made a warrantless arrest on probable cause before seizing the object.

The State then compounds its errors by citing this Court to a plethora of cases which deal with at least five other issues which have nothing to do with this case. It uses these cases to try to demonstrate a nationwide split in authorities in an attempt to satisfy this Court's Rule 10.1(b).

Properly phrased on the record in this case, the issue is whether Terry v. Ohio, 392 U.S. 1 (1968) permits a police

officer to perform a "pat frisk" for evidence, and then, upon discovering an item in a detainee's interior pocket which is clearly not a weapon, to manipulate it, remove it and inspect it.

When the Minnesota Supreme Court's decision is analyzed by reference to the record and to the exact issue it decided, and when the host of cases to which the State has cited this Court is pared away, it is clear that the Minnesota appellate courts properly applied Terry v. Ohio, 392 U.S. 1 (1968), and that, as shown herein, there does not exist the conflict in the lower courts that the State claims.

B. Application Of Terry v. Ohio To This Case

The Minneapolis officer who testified in this case told the District Court that he stopped Respondent Dickerson because 1) he saw Dickerson leaving a twelve-unit apartment building known to police as the site of prior narcotics enforcement activity, and 2) he believed Dickerson had seen the police car, and had then changed direction (T.7-8,15,20-21).

The officer then told the court that he drove his car into the alley behind the apartment building to confront Dickerson because he thought Dickerson's change of course suspicious (T.9,15-16,20).

He testified that he stopped Dickerson "[t]o check him for weapons and

contraband[,]" (T.9), and that, while performing the frisk of Mr. Dickerson, whom he had never seen before (T.14):

> I came back up to the chest and I hit a nylon jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.

(T.9). He then removed the object (T.9). Until the officer removed the cocaine from Mr. Dickerson's pocket, Dickerson was not suspected of a crime, was not in any way related to the officer's presence in that area, and was not under arrest (T.14-16).

Although the officer claimed that he knew right away what he felt in Mr. Dickerson's pocket, he did not make a warrantless felony arrest on probable

cause until after he had removed the object and inspected it (T.9-10).

The District Court stated in its memorandum that the officer did not feel a weapon during the "pat frisk." *See* State's Petition For A Writ Of Certiorari, Appendix C-5. The record supports its conclusion on that point.

There is nothing revolutionary, or even surprising, in the Minnesota Supreme Court's ruling in light of this record. All that court did was to apply this Court's ruling in Terry v. Ohio, 392 U.S. 1 (1968) to the facts before it. The Minnesota court said:

> The pat search of the defendant went far beyond what is permissible under *Terry* . . . .
>
> *Terry* permits a protective frisk for weapons. When the officer assures himself or herself that no weapon is present, the frisk is over. During the course of the

> frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon.

State v. Dickerson, 481 N.W.2d 840, 843-44 (Minn. 1992). *See also* United States v. Williams, 822 F.2d 1174, 1184 (D.C. Cir. 1987) (officer may not manipulate object discovered during "pat frisk" which is clearly not a weapon).

Referring to the officer's testimony that his purposes in searching were to discover weapons and contraband, the court observed, "he set out to flaunt the limitations of *Terry*, and he succeeded." State v. Dickerson, 481 N.W.2d at 844. *See* United States v. Williams, 822 F.2d 1174, 1181 n. 75 (D.C. Cir. 1987) (officer's Terry search

improper because he thought he would find narcotics, not a weapon).

The Minnesota Supreme Court also questioned the police officer's testimony that he knew immediately the nature of the object. It said:

> The officer's 'immediate' perception is especially remarkable because this lump weighed 0.2 grams and was no bigger than a marble. . . . But a close examination of the record reveals that . . . the officer's 'immediate' discovery in this case is fiction, not fact.
>
> The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he 'immediately' knew what he had found.

Id.

The Minnesota Supreme Court's decision in this case is completely loyal to the teaching of Terry v. Ohio, 392

U.S. 1 (1968); *see also* Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. 1991) (not all small particles discovered by touch in a detainee's pocket are drugs).

This Court's opinion in Terry v. Ohio is nothing if not cautious, and is clear that the exception it created was *solely* limited to protecting the police officer's safety. *Id.* at 26-30.

Subsequent decisions of this Court, including the one cited by the State of Minnesota in its Petition, have maintained fidelity to the limits Terry v. Ohio placed on "pat frisks." *See* Michigan v. Long, 463 U.S. 1032, 1049 n. 14 (1983) (*Terry* search is not justified by need to uncover and preserve evidence, but is limited to protection of the police officer).

The State attempts to make this Court's decision in Michigan v. Long stand for more than it does. That case simply applied the rule of Terry v. Ohio to the interior of an automobile, a rule that Minnesota adopted two years earlier. *See* State v. Gilchrist, 299 N.W.2d 913 (Minn. 1980). Once the officer in Michigan v. Long saw the contraband while performing a proper Terry v. Ohio search, he had probable cause to arrest, and to conduct a further examination pursuant to that arrest. Michigan v. Long, 463 U.S. 1032, 1036 (1983).

III. THE STATE'S REMAINING THEORIES NEITHER SUPPORT THE SEARCH IN THIS CASE NOR DEMONSTRATE A CONFLICT AMONG THE LOWER COURTS.

A. Perception Of A Weapon During A "Pat Frisk"

The State of Minnesota has cited this Court to three cases in which firearms were discovered during a "pat frisk." *See*, Matter of Marrhonda G., 575 N.Y.S.2d 425 (N.Y. Fam. Ct. 1991); State v. Ortiz, 683 P.2d 822 (Haw. 1984); People v. Chavers, 658 P.2d 96 (Cal. 1983). The State is apparently attempting to show that the Minnesota Supreme Court's ruling below conflicts with these cases and would prevent the police from seizing a weapon discovered by sense of touch during a proper "pat frisk."

This argument fails because the Minnesota Supreme Court's ruling in this case contains nothing which prevents a police officer from seizing a gun he has located, even if by sense of touch, during a proper "pat frisk."

People v. Chavers permitted a Terry v. Ohio search of the glove box of a car which had been stopped because its occupants were suspects in an armed robbery. People v. Chavers, 658 P.2d at 101-103. State v. Ortiz permitted a Terry v. Ohio search of a suspect's knapsack. State v. Ortiz, 683 P.2d at 826-27. Matter of Marrhonda G. involved an officer's wholly inadvertent discovery of a weapon inside a knapsack that he picked up from the floor of a police station. Matter of Marrhonda G., 575 N.Y.S.2d at 428.

Nothing in the Minnesota court's decision in this case prevents a police officer from detecting the presence of, and seizing, a weapon during the course of a proper Terry v. Ohio pat frisk. In fact, the Minnesota court has long held that a weapon which is felt during a proper Terry v. Ohio "pat frisk," may be retrieved and admitted into evidence. *See*, State v. Gilchrist, 299 N.W.2d 913 (Minn. 1980). Moreover, the State's argument on this point ignores the facts of Terry v. Ohio itself, in which the officer felt and retrieved a weapon.

In short, nothing about the decision below in this case prevents the police from properly performing a Terry v. Ohio "pat frisk," and retrieving a weapon while doing so.

B. Searches Of Containers The Contents Of Which Are Immediately Apparent

In a related vein, the State of Minnesota has cited this Court to several cases dealing with searches of containers, the contents of which are immediately apparent. *See* State v. Vasquez, 815 P.2d 659 (N.M. Ct. App. 1991); Matter of Marrhonda G., 575 N.Y.S.2d 425 (N.Y. Fam. Ct. 1991); United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987); United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981); United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980).

The State's goal in citing these cases appears to be to equate the so-called "plain touch" search here with "plain view" searches, and to suggest that the Minnesota Supreme Court's ruling in this case, which did not involve a

container, conflicts with various "container search" cases from other jurisdictions.

The "contents immediately apparent" cases generally hold that, if the containers betray their contents, by means of a sensory perception (sight, smell, touch), they can properly be searched without a warrant. *See* United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987). They do not, however, support the State's argument, and have little to do with the case at hand, for the following reasons:

First, the "contents immediately apparent" cases rest upon a dictum in this Court's decision in Arkansas v. Sanders, 442 U.S. 753, 764-65 n. 13 (1979). That dictum suggested that searches of some containers would not

violate the Fourth Amendment because the containers, the contents of which can be inferred from their outward appearance, did not support a reasonable expectation of privacy. One of the examples given in the dictum was a gun case.

However, this Court overruled Arkansas v. Sanders last term in California v. Acevedo, ___ U.S. ___, ___, 111 S.Ct. 1982, 1989 (1991). Since Arkansas v. Sanders was overruled, it is reasonable to conclude that its discussion of note 13 is also overruled, although one New York trial court has concluded otherwise. Matter of Marrhonda G., 575 N.Y.S.2d 425, 430 n. 2 (1991). While it may be that this dictum is nothing more than traditional "plain view" analysis, and while it may be true that some containers, particularly

firearms cases, may betray their contents so as to lose any Fourth Amendment protection, application of the Arkansas v. Sanders dictum to the interior of Respondent Dickerson's jacket pocket is indeed labored.

Second, the "contents immediately apparent" cases essentially hold that a possessor has no privacy interest in containers, the contents of which are visible to the public. *See* United States v. Ocampo, 650 F.2d 421, 429 (2d Cir. 1981); United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987). By contrast, Respondent's act of secreting the minuscule amount of contraband involved in this case in an interior pocket of an opaque garment in fact manifested an expectation that his pocket's contents would remain private,

impervious to public inspection. Moreover, four of the five cases the State has cited on this point involve vehicles. This Court has long held that an individual has a significantly reduced expectation of privacy in vehicles and their contents. *See, e.g.*, California v. Carney, 471 U.S. 386, 391 (1985).

Third, the "contents immediately apparent" cases typically involve items that are seen and readily identifiable. By contrast, it is not possible to as readily identify objects touched, especially when they are minuscule, like the object in this case. As the Washington Supreme Court said, "The tactile sense does not usually result in the *immediate* knowledge of the nature of the item." State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982). The Minnesota

Supreme Court, as noted previously, explicitly agreed with this sentiment when it questioned the officer's conclusion that he knew immediately what he had touched. State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992).

More importantly, detection of evidence by sight or smell may be accomplished without a physical intrusion, unlike the tactile detection of evidence in this case. State v. Broadnax, 654 P.2d at 102.

C. Warrantless Arrest On Probable Cause And Incidental Search

The State of Minnesota appears to argue that the Minneapolis officer, having felt the object in Respondent Dickerson's pocket, had probable cause to make a warrantless felony arrest for

possession of cocaine, and therefore could have performed a warrantless search incident to that arrest. In making this argument, the State cites to a number of decisions, and to this passage from Professor LaFave's treatise:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband . . . in which case there may be a further search based upon that probable cause.

3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(c), at 524 (2d Ed. 1987) (*hereinafter*, LaFave).

Respondent Dickerson does not dispute that the posture of this case

would be different if the officer, having felt the object, and given the circumstances then existing, had immediately made a warrantless arrest on probable cause, and then retrieved the object as part of an incidental search. But he did not do that.

Because there *is* no exception to the warrant requirement which permits a search on probable cause of something other than a vehicle, the scenario just described must be the subject of the LaFave passage.

The principal case LaFave uses to support this conclusion is State v. Ludtke, 306 N.W.2d 111 (Minn. 1981). That case was presented to the Minnesota appellate courts by Respondent Dickerson, and was discussed at length by the Minnesota Supreme Court. That court

treated State v. Ludtke as a search incident to a warrantless arrest. *See* State v. Dickerson, 481 N.W.2d at 846.

The State's reconstruction of what actually occurred in the Minnesota courts, in conjunction with its "further search on probable cause" argument, raises a number of problems.

First, the State did not argue this position before the District Court, a fact noted by the Minnesota Court of Appeals. *See* State v. Dickerson, 469 N.W.2d 462, 467 (Minn. Ct. App. 1991).

Second, the officer's testimony, as construed by the Minnesota Supreme Court, belies any claim that he immediately had probable cause to arrest for possession of cocaine. The Minnesota Supreme Court characterized this claim as "fiction," noting that the officer, although he

claimed he knew immediately that he had touched cocaine, nevertheless manipulated the object with his fingers and slid it in Respondent's pocket. State v. Dickerson, 481 N.W.2d at 844.

Third, the fact of the matter is that the officer did *not* make a warrantless arrest for cocaine possession until *after* he had removed and examined the object. This Court has repeatedly held that a search incident to arrest may not precede the arrest. *See* Smith v. Ohio, 494 U.S. 541 (1990).

Fourth, the State fails to note that, in the same section of his treatise, LaFave also says, "Under the better view, then, a search is not permissible when the object felt is soft in nature." 3 LaFave, *supra* § 9.4(c), at 523.

Fifth, in each of the cases cited by Petitioner on this point, just as in State v. Ludtke, 306 N.W.2d 111 (Minn. 1980), the police had probable cause to make a warrantless felony arrest, and thus, an incidental search. Ruffin v. Commonwealth, 409 S.E.2d 177 (Va. Ct. App. 1991); Jackson v. State, 804 S.W.2d 735 (Ark. Ct. App. 1991); State v. Richardson, 456 N.W.2d 830 (Wis. 1990); United States v. Ceballos, 719 F.Supp. 119 (E.D.N.Y. 1989); State v. Vanacker, 759 S.W.2d 391 (Mo. Ct. App. 1988); State v. Lee, 520 So.2d 1229 (La. Ct. App. 1988); State v. Bearden, 449 So.2d 1109 (La. Ct. App. 1984). To the same effect is this Court's decision in Texas v. Brown, 460 U.S. 730, 742 (1983), which the State suggests should control the

question of the so-called "plain touch" search.

In a further effort to justify the search in this case as a search incident to a warrantless arrest on probable cause, the State has cited this Court to several cases discussing the formation of probable cause based upon smell of contraband. *See* Petition For A Writ Of Certiorari at 12. These cases are irrelevant to the issue at hand.

Simply put, searches based on smell and the other sense-based searches at issue in the cases cited by the State are not of like kind, and cannot be analyzed as such. Certain odors are so distinctive that probable cause to arrest may immediately exist. However, tactile impressions, particularly of objects no larger than an aspirin tablet, *see*

Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. 1991), cannot be so easily ascertained, and certainly not without a physical intrusion. State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982). As the court said in a case involving a similar search, "To sanction a search under the facts of this case would be to allow police officers to assume that all small objects in one's pocket could be drugs." Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. 1991).

CONCLUSION

For the reasons discussed here, this Court should: 1) deny the State's Petition For A Writ Of Certiorari because the case is moot; 2) deny the State's Petition because the Minnesota appellate

courts properly applied the rule of Terry v. Ohio, 392 U.S. 1 (1968); 3) deny the State's Petition because it has not demonstrated that a conflict actually exists in the lower courts over the use of the so-called "plain feel" exception to the warrant requirement.

Respectfully submitted,

WILLIAM R. KENNEDY
HENNEPIN COUNTY PUBLIC DEFENDER

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Jeffrey A. Topor
Law Clerk

July 13, 1992

INDEX TO APPENDICES

STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF HENNEPIN	**4TH JUDICIAL DIST.**

State of Minnesota,	)	**ORDER**
	)	**DISCHARGING**
Plaintiff,	)	**DEFENDANT**
	)	**FROM**
SIP No. 89-067687	)	**SUPERVISION**
	)	**AND**
CO. ATTY. No. 89-3646	)	**DISMISSING**
	)	**COMPLAINT**
TIMOTHY E. DICKERSON,	)	
	)	
Defendant.	)	

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WHEREAS, the above named defendant has been under supervision of the Bureau of Community Corrections, Felony Probatic pursuant to an Order of this Co , and

WHEREAS, said Felony Probation reports that the defendant has made satisfactory progress and recommends his discharge from supervision and,

WHEREAS, the Hennepin County Attorney has recommended that this Court dismiss the Complaint on the file herein.

NOW THEREFORE IT IS HEREBY ORDERED That the defendant be discharged from supervision by the Felony Probation Division, and

IT IS FURTHER ORDERED, That the Complaint on file herein be and the same is hereby dismissed.

By the Court:

/S/ Robert H. Lynn

Judge Robert H. Lynn

DATED: 4/28/92

Minn. Stat. § 152.18, subd. 2:

Upon the dismissal of such person and discharge of the proceedings against the person pursuant to subdivision 1, such person may apply to the district court in which the trial was had for an order to expunge from all official records, other than the nonpublic record retained by the department of public safety pursuant to subdivision 1, all recordation relating to arrest, indictment or information, trial and dismissal and discharge pursuant to subdivision 1. If the court determines, after hearing, that such person was discharged and the proceedings dismissed, it shall enter such order. The effect of the order shall be to restore the person, in the contemplation of the law, to the

status the person occupied before such arrest or indictment or information. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made for the person for any purpose.

Minn. Stat. § 299C.11:

. . . Upon the determination of all pending criminal actions or proceedings in favor of the arrested person, the arrested person shall, upon demand, have all such finger and thumb prints, photographs, and other identification data, and all copies and duplicates thereof, returned, provided it is not established that the arrested person has been convicted of any felony, either within or without the state, within the period of ten years immediately preceding such determination.